



1      October 30, 2006 before the Hon. David A. Ezra for a maximum of 25 trial days.<sup>2</sup> (docket  
2      # 1715)

3              In addition to the subject Motion, the Court has reviewed the following:  
4      BHP's required certifications pursuant to Rule 37(a)(2), Fed.R.Civ.P., and LRCiv 7.2(j)  
5      regarding discovery disputes (dockets # 1754 and # 1753, respectively); PDMI/  
6      Inspiration's timely Response (docket # 1760) in opposition thereto, filed on May 8, 2006;  
7      BHP's Reply (docket # 1761), filed May 12, 2006; PDMI/Inspiration's unauthorized  
8      Supplemental Exhibit To Their Response to BHP's Motion To Compel (docket # 1762)  
9      which in reality is a surrebuttal pleading<sup>3</sup>, filed on May 15, 2006; BHP's Response To  
10      PDMI/Inspiration's Supplemental Exhibit To BHP's Motion To Compel (docket # 1768)  
11      and Notice of Errata etc. (docket # 1771), filed on May 23, 2006 and June 6, 2006,  
12      respectively; and many of the approximately 12 inches of exhibits provided by both sides.

13                      **BACKGROUND**

14      Plaintiffs bring this action pursuant to the Comprehensive Environmental  
15      Response, Compensation, and Liability Act, 42 U.S.C. §§9601-9675 ("CERCLA") and the  
16      Arizona Water Quality Assurance Revolving Fund, Ariz. Rev. Stat. §§49-201-49-298  
17      ("WQARF") to recover past "response costs" for the cleanup of the Pinal Creek Drainage  
18      Basin, located near Miami, Arizona, and for declaratory and monetary relief regarding past  
19      and future groundwater remediation costs. The Pinal Creek Site has been contaminated for  
20      nearly 100 years by mining practices at various locations by different mine operators. The  
21      parties' familiarity with the complex facts and various claims and crossclaims since the filing  
22      of this suit over fourteen (14) years ago obviates the need for further discussion by the Court  
23      for purposes of ruling on this discovery motion.

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25      <sup>2/</sup> The parties have stipulated to the trial beginning on October 30, 2006 or the first  
26      available date following this date. (docket # 1714 at 6)

27      <sup>3/</sup> Rather than striking PDMI/Inspiration's unauthorized pleading and attempt to have  
28      the last word, the Court will consider it and BHP's Response thereto on the merits of the  
            subject Motion.

1           In the pending Motion to Compel, BHP seeks production of seven (7) separate  
2 categories of documents "related to the technical work performed by PDMI/Inspiration's  
3 litigation consultant and technical strategist, Golder Associates, Inc. ("Golder"), for their  
4 three testifying experts and their resultant reports." (docket # 1752 at 1) PDMI/Inspiration's  
5 three testifying experts are: (1) Dr. C.W. Fetter, Jr. ("Fetter"), (2) Craig M. Bethke  
6 ("Bethke"), and (3) Adrian Brown ("Brown"). BHP argues that PDMI/Inspiration is  
7 "circumvent[ing] their discovery obligations by simply and intentionally using litigation  
8 consultants as assistants to their experts and then declaring that their experts' assistants' work  
9 files do not have to be produced under the 'work product' protection." (*Id.* at 2)

10           BHP seeks an order compelling the following categories of documents  
11 prepared by or located in the files of PDMI/Inspiration's litigation consultants and non-  
12 testifying experts (Golder) related to Golder's technical work performed for Fedder, Bethke  
13 and Brown:

14           A. All communications between Golder and Fedder, Bethke and Brown since  
15 June 1, 2003 (close of discovery);

16           B. All documents in Golder's files related to the work Golder performed for  
17 Fedder, Bethke and Brown since June 1, 2003;

18           C. All documents in Golder's files related to specific tasks identified in  
19 Fedder's, Bethke's and Brown's reports as being assigned by any of them to Golder;

20           D. All documents in hard copy and digital format placed on Golder's FTP site  
21 related to Golder's work accessible to Fedder, Bethke and Brown since June 1, 2003;

22           E. All Golder documents conveyed to Fedder, Bethke and Brown, directly or  
23 indirectly, by Golder or a third party, including PDMI/Inspiration's personnel and attorneys,  
24 since June 1, 2003;

25           F. All communications between Golder and PDMI/Inspiration's attorneys  
26 related to Golder's work for Fedder, Bethke and Brown including work related to the experts'  
27 reports;

28

1 G. All Golder's unredacted invoices that relate to Golder's work for Fedder,  
2 Bethke and Brown; and

9 BHP argues that it "needs the Golder documents to test the legitimacy and  
10 quality of the Golder work upon which the three PDMI/Inspiration experts claim they relied  
11 in forming their opinions." (docket # 1761 at 4) BHP "claims that PDMI/Inspiration are  
12 improperly manipulating the 'work product' doctrine to prevent BHP from having access to  
13 documents directly relevant to the expert opinions of PDMI/Inspiration's three testifying  
14 experts." BHP's Reply clarifies the reason it seeks this discovery: "BHP has fully developed  
15 its case. BHP does not seek to build its own case from Golder's work but rather wants to  
16 meaningfully cross examine Fetter about Golder's work which is essential to Fetter's  
17 opinions[,"] citing Derrickson v. Circuit City Stores, Inc., 1999 WL 1456538 (D. Md. 1999)  
18 and other cases. (*Id.* at 10)

19 PDMI and Inspiration argue in opposition that BHP "demands core work  
20 product from the files of PDMI's and Inspiration's non-testifying experts, Golder Associates,  
21 including communications between these litigation consultants and PDMI's and Inspiration's  
22 counsel. . . ." (docket # 1760 at 1 - 2) PDMI/Inspiration asserts that the documents BHP  
23 seeks "have never been provided to, or reviewed by [PDMI/Inspiration's] testifying experts"  
24 and "[a]ll of the work Golder performed for the experts has been fully disclosed." They argue

26       <sup>4/</sup> BHP's Response To PDMI/Inspiration's Supplemental Exhibit etc., filed after  
27 Bethke's May 17, 2006, indicates that these documents are relevant to Bethke's bias and  
28 "calls directly into question the independent integrity of Dr. Bethke's opinions in this matter."  
(docket # 1768 at 4)

1 that BHP's "real goal is to obtain documents that reveal mental impressions, theories, and  
 2 legal strategy[.]" PDMI/Inspiration contends that the documents BHP seeks do not fall  
 3 within the production mandate of Fed.R.Civ.P. 26(a)(2) requiring production of any  
 4 information provided to a testifying expert; is protected from discovery by the work product  
 5 privilege and Rule 26(b)(1), FED.R.CIV.P.; and that exceptional circumstances do not exist  
 6 to warrant production of all the documents and the depositions of Golder personnel that BHP  
 7 seeks pursuant to Rule 26(b)(3) and Rule 26(b)(4)(B).

8 PDMI/Inspiration claim that they have already produced to BHP all documents  
 9 and materials described in three of the seven categories identified by BHP: category A  
 10 (communications between Golder and the testifying experts), category D (documents made  
 11 available to experts on Golder's File Transfer Protocol ("FTP")), and category E (all Golder  
 12 documents conveyed to the experts directly or indirectly). (*Id.*) PDMI/Inspiration asserts  
 13 that only three categories<sup>5</sup> of documents are at issue here: category C (Golder internal files  
 14 related to tasks performed for the experts, but not provided to the testifying experts), category  
 15 F (Golder's privileged communications with counsel which PDMI/Inspiration asserts was not  
 16 provided to testifying experts), and category G (Golder's "unredacted" invoices which  
 17 PDMI/Inspiration asserts have not been provided to the testifying experts).

18 BHP's Reply argues that "just like the Wizard of Oz, PDMI/Inspiration tells  
 19 BHP and this Court to 'pay no attention to the man behind the curtain[]'" because "[a]lmost  
 20 all of the opinions that Fetter expresses in his Supplemental Report, including representations  
 21 in his charts and tables, are based on data and analyses from Golder." (docket # 1761 at 2)  
 22 BHP frequently cites the record to support its claims of the relationship between Golder and  
 23 Fetter and gives several examples, such as, Fetter's reliance upon Golder's expertise to  
 24 conduct the mass flux analysis for Bloody Tanks Wash, mass removal analysis from Kiser  
 25 Basin, Golder's calculation that the mass flux from Webster Gulch was 57 pounds per day  
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27 <sup>5/</sup> PDMI/Inspiration apparently overlooks category B (All documents in Golder's files  
 28 related to the work Golder performed for Fedder, Bethke and Brown since June 1, 2003).

1 from 1994 to 2002, and that certain data collected before 1989 is unreliable. (*Id.* at 2 - 4).  
 2 BHP argues that it cannot adequately test Fetter's, Bethke's and Brown's reliance on Golder's  
 3 data and analysis without knowing what exactly Golder did and only Golder's files have this  
 4 information. To justify why exceptional circumstances exist to warrant discovery of Golder's  
 5 files, BHP points out, for example, that Fetter cannot explain how Golder performed the  
 6 work he requested because Fetter does not know. (*Id.* at 3) Fetter does not know what steps  
 7 Golder took to mine data from the Pinal Creek Database. (*Id.*) Fetter is not even certain what  
 8 database the data he received from Golder came from. (*Id.*; Exh. 1:11:6-12:24)

9 **WORK PRODUCT IMMUNITY**

10 The work product doctrine limits discovery of material obtained and prepared  
 11 by an attorney or the attorney's agent in anticipation of litigation or preparation for trial.  
 12 Hickman v. Taylor, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1945). The doctrine  
 13 establishes a qualified immunity, rather than a privilege, and the qualification of the  
 14 immunity is to be determined upon a showing of necessity or good cause. *Id.*; Admiral Ins.  
 15 Co. v. U.S. District Court, 881 F.2d 1486, 1494 (9th Cir.1989); Doubleday v. Ruh, 149  
 16 F.R.D. 601, 605 n. 3 (E.D.Cal.1993); United States v. City of Torrence, 163 F.R.D. 590, 592-  
 17 93 (C.D. Cal. 1995).

18 In an effort to address the inconsistent opinions in federal courts after Hickman,  
 19 in 1970, the Supreme Court adopted Federal Rule of Civil Procedure 26(b)(3), which  
 20 provides in relevant part:

21 Subject to the provisions of subdivision (b)(4) of this rule, a party may  
 22 obtain discovery of documents and tangible things otherwise discoverable  
 23 under subdivision (b)(1) of this rule and prepared in anticipation of litigation  
 24 or for trial by or for another party or by or for that other party's representative  
 25 (including the other party's attorney, consultant . . . or agent) only upon a  
 26 showing that the party seeking discovery has substantial need of the materials  
 27 in the preparation of the party's case and that the party is unable without undue  
 28 hardship to obtain the substantial equivalent of the materials by other means.

26 Fed.R.Civ.P. 26(b)(3); Southern Union Company v. Southwest Gas Corporation, 205 F.R.D.  
 27 542, 548-49 (D. Az 2002). Thus, the following conditions must be satisfied by the proponent  
 28 in order to establish work product protection: (1) the material must be a document or tangible

1 thing; (2) it must be prepared in anticipation of litigation; and (3) it must be prepared by or  
 2 for a party, or by or for its representative. Holmes v. Pension Plan of Bethlehem Steel Corp.,  
 3 213 F.3d 124, 138 (3d.Cir.2000); Southern Union, 205 F.R.D. at 549. Rule 26(b)(3)  
 4 expressly directs that the court shall protect against disclosure "the mental impressions,  
 5 conclusions, opinions, or legal theories of an attorney or other representative of a party  
 6 concerning the litigation." The party claiming work product immunity has the burden of  
 7 proving the applicability of the doctrine. City of Torrence, 163 F.R.D. at 593; Holmes v.  
 8 Pension Plan of Bethlehem Steel Corp., 213 F.3d 124, 138 (3d.Cir.2000); Nutmeg Ins. Co.  
 9 v. Atwell, Vogel & Sterling, 120 F.R.D. 504 (W.D.La.1988). The party seeking discovery  
 10 of facts known or opinions held by consulting experts who are not expected to be called as  
 11 trial witnesses, however, has the burden of demonstrating the existence of exceptional  
 12 circumstances to overcome the work product immunity. Roesberg v. Johns-Manville Corp.,  
 13 85 F.R.D. 292 (E.D.Pa.1980); Hartford Fire Ins. Co. v. Pure Air on the Lake, Ltd., 154  
 14 F.R.D. 202, 207 (N.D. Ind. 1993). This latter burden has been characterized as a "heavy" one,  
 15 In re Shell Oil Refinery, 132 F.R.D. 437, 442 (E.D.La.1990), clarified by 134 F.R.D. 148  
 16 (E.D.La.1990), but "is not an 'impenetrable fortress' against discovery and parties seeking  
 17 discovery can make a showing of exceptional circumstances when there is no practicable  
 18 alternative by which they can obtain the information." Hartford Fire Ins. Co., 154 F.R.D. at  
 19 207.

20 Case law has determined that there are two types of work product, ordinary  
 21 work product and opinion work product. Southern Union, 205 F.R.D. at 549. "Generally,  
 22 opinion work product, including the mental impressions, conclusions, opinions, or legal  
 23 theories of an attorney, is entitled to nearly absolute protection." Id.; Holmgren v. State Farm  
 24 Mutual Auto. Ins. Co., 976 F.2d 573, 577 (9th Cir.1992) (holding that opinion work product  
 25 is entitled to nearly absolute protection with limited exceptions). "Ordinary work product,  
 26 by contrast, is subject to disclosure upon a showing by the party seeking discovery of  
 27 substantial need and its inability to obtain the materials by other means." Southern Union,  
 28 205 F.R.D. at 549; Upjohn Co. v. United States, 449 U.S. 383, 401 (1981) (declining to

1 decide whether opinion work product is entitled to absolute protection but recognizing that  
 2 ordinary work product is discoverable upon a showing of substantial need and inability to  
 3 obtain materials without undue hardship).

4           "As originally articulated[,] . . . the purpose of the work product doctrine was  
 5 to preserve 'the historical and the necessary way in which lawyers act within the framework  
 6 of our system of jurisprudence to promote justice and to protect their clients' interests.' In  
 7 developing the work product doctrine the [Supreme] court focused exclusively on the privacy  
 8 interests of lawyers, on shielding 'the privacy of an attorney's course of preparation.' " City  
 9 of Torrence, 163 F.R.D. at 593 (citing Hewlett-Packard Co. v. Bausch & Lomb, Inc., 116  
 10 F.R.D. 533, 538 (N.D.Colo.1987)). "One of the primary purposes of the work product  
 11 immunity is to prevent one party from exploiting the other party's efforts to prepare for  
 12 litigation." City of Torrence, 163 F.R.D. at 593 (citing Admiral Ins. Co., 881 F.2d at 1494).  
 13 "[T]he private mental impressions and legal theories of counsel' are the work product to be  
 14 protected." City of Torrence, 163 F.R.D. at 593 (citing Intermedics, Inc. v. Ventritex, Inc.,  
 15 139 F.R.D. 384, 391 (N.D.Ca.1991), aff'd without op. 991 F.2d 808 (Fed.Cir.1993)). Counsel  
 16 must be afforded the opportunity "to think dispassionately and creatively about his client's  
 17 case in private [and] . . . to . . . have [] uninhibited, roaming, educational interchanges with  
 18 experts. . . ." Id. at 392. When counsel, however, forwards documents prepared by a  
 19 non-testifying consultant to a testifying expert, they become discoverable. Any protection  
 20 the documents may have had no longer applies. "In general, the work-product privilege has  
 21 been held not to apply to opinions and documents generated *or consulted* by an expert  
 22 retained to testify at trial." City of Torrence, 163 F.R.D. at 593 (citing County of Suffolk v.  
 23 Long Island Lighting Co., 122 F.R.D. 120, 122 (E.D.N.Y.1988)) (emphasis added.) (citations  
 24 omitted.) Rule 26(b)(4) "has been broadly interpreted to authorize disclosure of both expert  
 25 opinions and 'all the documents the expert generated *or examined* in the process of forming  
 26 those opinions.' " Id., (quoting Hewlett-Packard, 116 F.R.D. at 536) (emphasis in original).  
 27 "[A]bsent an extraordinary showing of unfairness that goes well beyond the interest generally  
 28 protected by the work product doctrine, written and oral communications from a lawyer to

1 an expert that are related to matters about which the expert will offer testimony are  
 2 discoverable, even when those communications would be deemed opinion work product."  
 3 City of Torrence, 163 F.R.D. at 593 (citing Intermedics, 139 F.R.D. at 387).

4 "Discovery of documents shown to an expert, but not retained in the expert's  
 5 file, assures the 'independence of the expert's thinking, both her analysis and her conclusions.  
 6 The risk is that the lawyer will do the thinking for the expert, or, more subtly, that the expert  
 7 will be influenced, perhaps appreciably, by the way the lawyer presents or discusses the  
 8 information." City of Torrence, 163 F.R.D. at 593 (citing Intermedics, 139 F.R.D. at 393).

9 "What the [Advisory] Committee sought to promote [in the 1970 amendments to Rule 26]  
 10 was a fair opportunity to expose whatever weaknesses, unreliabilities, or biases might infect  
 11 the opinions of testifying experts called by adverse party. Id. at 389. Pursuit of such fairness  
 12 would have been thoroughly frustrated if the rule prohibited a party from showing that the  
 13 opinions an expert was presenting at trial as his own had in fact been spoon fed to him and  
 14 written for him by the lawyer who retained him." Id. at 389; City of Torrence, 163 F.R.D. at  
 15 593.

16 "A number of cases hold that 'exceptional circumstances' allowing for  
 17 discovery of a non-testifying expert's opinion exist where the object or condition observed  
 18 is not observable by an expert of the party seeking discovery." Hartford Fire Ins. Co., 154  
 19 F.R.D. at 208 (citing Delcastor, Inc. v. Vail Assoc., 108 F.R.D. 405, 409 (D. Colo. 1985);  
 20 Dixon v. Cappellini, 88 F.R.D. 1 (M.D. Pa. 1980) (citations omitted). Likewise, exceptional  
 21 circumstances has been shown where a non-testifying expert's report will be used by a  
 22 testifying expert as the basis for an expert opinion. Id. (citing, Heitmann v. Concrete Pipe  
 23 Machinery, 98 F.R.D. 740 (E.D. Missouri 1983)). "In sum, Rule 26(b)(4)(B) 'is based on a  
 24 concept of fairness.'" Id. (citation omitted) "As such, issues arising under Rule 26(b)(4)(B)  
 25 are resolvable only on a case-by-case basis." Id.

26 In Derrickson v. Circuit City Stores, Inc., 1999 WL 1456538 (D. Md.),  
 27 affirmed in 203 F.3d 821 (4<sup>th</sup> Cir. 2000), an employment discrimination case, plaintiff's  
 28 expert witness presented various tables regarding compensation and promotions at Circuit

1 City and based his opinion in part on the information in those tables. The tables, however,  
 2 were based on data that was subjected to various selection, aggregation and weighting  
 3 processes performed by the assistant of plaintiff's expert witness. Plaintiff's expert testified  
 4 at deposition that he told his assistant in general terms what manipulations and analyses he  
 5 wanted performed on the data. His assistant then wrote a series of computer instructions  
 6 using a commercially available statistics program that analyzed the data and produced the  
 7 tables upon which the expert relied.

8                   The district court in Derrickson wrote that it "need not waste its time analyzing  
 9 the work of the expert's assistant as the work of a so-called 'non-testifying' expert" because  
 10 plaintiff's expert and his assistant "worked hand-in-glove, and the fruits of their labor are  
 11 indivisible. Defendant cannot properly cross-examine [the expert] without first understanding  
 12 how his assistant manipulated the data. . .[The expert's] opinions in this matter are the result  
 13 of a seamless collaboration with his assistant. Under these circumstances, Defendant is  
 14 entitled to know what [the expert's] assistant did." 1999 WL 1456538 \*7.

15                   The district court continued:

16                   Even if the court considered [the expert's] assistant to be a  
 17 non-testifying expert, the result would be the same. Defendant is not engaging  
 18 in the sort of free riding that Rule 26(b)(4)(B) was meant to prevent. The  
 19 purpose of Rule 26(b)(4)(B) is to prevent a party from building its own case  
 20 through its opponent's diligence. (citation omitted). In this instance, Defendant  
 21 does not seek to build its own case with [the expert's] work but rather seeks to  
 22 tear down Plaintiffs' case. That is entirely proper. Moreover, Rule 26(b)(4)(B)  
 23 provides that the "facts known and the opinions held by an expert . . . who is  
 24 not expected to be called at trial" are discoverable "upon a showing of  
 25 exceptional circumstances under which it is impracticable for the party seeking  
 26 discovery to obtain facts or opinions on the same subject by other means." Only  
 27 [the expert's] assistant knows what he did to the data, and because that  
 28 information is exclusively within the assistant's cognizance, Defendant is  
 29 entitled to it under Rule 26(b)(4)(B). (citation omitted).

30                   <sup>14</sup>Id. Moreover, the district court opined that Defendant was entitled to take the deposition of  
 31 plaintiff's expert's assistant. Id. at n. 1.

## 32                   DISCUSSION

33                   There is no dispute here that what BHP is seeking falls within the definition  
 34 of work product: the requested materials are documents or tangible things prepared in

1 anticipation of (or during) litigation by PDMI/Inspiration's representative, Golder. The issue,  
2 however, is whether BHP has demonstrated the requisite exceptional circumstances that in  
3 all fairness the materials it seeks from Golder should be disclosed pursuant to Fed.R.Civ.P.  
4 26(b)(3) for each of the three expert witnesses. The Court concludes that BHP has  
5 sufficiently demonstrated that exceptional circumstances do exist to overcome  
6 PDMI/Inspiration's work product immunity to Golder's work, i.e., BHP has substantial need  
7 for the materials it seeks to effectively cross examine PDMI/Inspiration's three testifying  
8 experts and is unable to obtain the materials by other means.

9                   BHP's Motion, Reply and Response To PDMI/Inspiration's Supplemental  
10 Exhibit etc., filed after Bethke's May 17, 2006 deposition, sufficiently demonstrate to the  
11 Court's satisfaction that Golder and all three experts, Fetter, Bethke and Brown, have worked  
12 hand-in-hand, like the "seamless collaboration" in Derrickson, and "directed Golder to  
13 perform technical tasks and analysis and that [the experts] relied upon Golder's work in  
14 forming their opinions." (docket # 1752 at 5) BHP demonstrates that "[i]n every one of the  
15 recent expert Reports produced by Fetter, Bethke and Brown, the three experts inserted  
16 charts, graphs and/or tables containing data and analyses provided by Golder. (Id. 5-6; Exh.  
17 3) Golder has conducted most of the substantive data analysis underlying Fetter's opinions.  
18 It is possible that Golder and, perhaps, PDMI/Inspiration's counsel have given significant  
19 direction to the formulation of the three expert's opinions and updated reports. BHP should  
20 be given a fair opportunity to prove that the expert opinions Fetter, Bethke and Brown will  
21 be presenting at the Phase II trial are truly their own or whether any portion or all of their  
22 opinions have "in fact been spoon fed to him and written for him by the lawyer who retained  
23 him." City of Torrence, 163 F.R.D. at 593. Like the defendant in Derrickson, BHP does not  
24 seek to build its own case with the discovery of Golder's work but rather BHP seeks to tear  
25 down PDMI/Inspiration's case and their experts' opinions through effective cross  
26 examination. This is entirely proper in our adversary process of truth finding.

27                   PDMI/Inspiration's Response indicates, among others, that the documents BHP  
28 seeks "have never been provided to, or reviewed by [PDMI/Inspiration's] testifying experts";

1 "[a]ll of the work Golder performed for the experts has been fully disclosed"; and  
2 PDMI/Inspiration has already produced to BHP all documents and materials described in  
3 three of the seven categories identifying by BHP. While these assertions may prove to be  
4 true, BHP should not be bound by an adverse party's statements or similar statements by  
5 adverse experts that they did not consider anything Golder or PDMI/Inspiration's counsel  
6 may have orally communicated, showed to or shared with them. As discussed in the City of  
7 Torrence case, "[t]he scope of discovery should not be limited to documents relied on by the  
8 expert in support of his opinions, but should extend to documents 'considered but rejected  
9 by the testifying expert in reaching opinions.' . . . '[I]n fact, the documents considered but  
10 rejected by the expert trial witness could be even more important for cross-examination than  
11 those actually relied upon by him.' " (citation omitted). City of Torrence, 163 F.R.D. at 594.  
12 BHP is entitled to uncover facts and information to effectively cross-examine  
13 PDMI/Inspiration's expert witnesses which constitute a showing sufficient to overcome the  
14 work product immunity from discovery.

15                   Accordingly,

16                   **IT IS ORDERED** that BHP Copper, Inc.'s ("BHP") Motion To Compel  
17 Production Of Experts' Work Files In The Possession Of Golder Associates, Inc. (docket #  
18 1752) is **GRANTED**.

19                   **IT IS FURTHER ORDERED** that PDMI and Inspiration shall produce to  
20 BHP, to the extent that they have not already been produced, by **5:00 p.m. on July 12, 2006**,  
21 the following documents:

22                   1. All documents concerning communications between Golder and experts  
23 Fetter, Bethke and Brown since June 1, 2003, including but not limited to notes,  
24 presentations, letters, emails or other memoranda of conversations.

25                   2. All documents making up Golder's project files concerning work done by  
26 Golder for Fetter, Bethke and Brown, since June 1, 2003, as stated in their Supplemental  
27 Reports as well as any drafts of said Reports that were received, commented upon, or  
28 revised (in part or whole) by Golder.

1                   3. All documents related to work that Golder has performed at the request  
2 of Fetter, Bethke and Brown and/or Counsel for PDMI /Inspiration, since June 1, 2003,  
3 related to these experts' Supplemental Reports, including but not limited to data gathering,  
4 water chemistry, well sampling, hydraulic conductivity, mass flux and ground water  
5 elevation as well as any drafts of Fetter's, Bethke's and Brown's Supplemental Reports or  
6 portions thereof that were received, commented upon, or revised (in part or whole) by  
7 Golder.

8                   4. All documents, including the hard copy and a copy in an electronic  
9 format as could be uploaded or downloaded, that were placed on Golder's FTP site  
10 concerning Fetter's, Bethke's and Brown's Supplemental Reports, since June 1, 2003.

11                  5. All documents within Golder's knowledge that were conveyed to Fetter,  
12 Bethke and Brown from Golder whether directly or indirectly, either by Golder or  
13 through a third party such as Counsel for PDMI and/or Inspiration, since June 1, 2003.

14                  6. All documents concerning communications with Counsel for PDMI /  
15 Inspiration relating to the subject matter of Fetter's, Bethke's and Brown's Supplemental  
16 Reports, since June 1, 2003.

17                  7. All documents concerning communications with PDMI/Inspiration  
18 relating to the subject matter of Fetter's, Bethke's and Brown's Supplemental Reports,  
19 since June 1, 2003.

20                  8. All invoices by Golder, in unredacted form, regarding work that Golder  
21 has done for Fetter, Bethke and Brown or related to the subject matter in Fetter's, Bethke's  
22 and Brown's Supplemental Reports, since June 1, 2003.

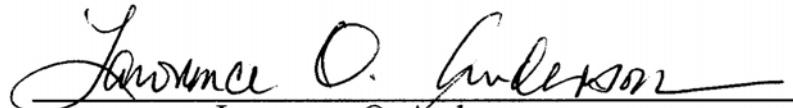
23                  9. All documents in Bethke's and Golder's possession showing the  
24 integrated licensing agreements and business relationship between Bethke and Golder  
25 outside their relationship in this case including documents evidencing the royalty and  
26 consultant payments thereon to Bethke and Golder.

27                  10. A privilege log detailing any documents or communications requested  
28 under paragraphs one through nine but not produced under a claim of privilege other than

1 work product privilege. The privilege log should include: the type of document; its  
2 author(s); its addressee(s); its recipient(s) (including recipients of copies); its date; its  
3 general subject matter; the nature of the claim or privilege asserted, and that part or  
4 portion of the document for which the privilege is asserted.

5 **IT IS FURTHER ORDERED** that BHP is hereby authorized to promptly  
6 depose appropriate Golder personnel after PDMI/Inspiration's complete compliance with  
7 this Order consistent with this Order and Rule 26(b)(4)(B), FED.R.CIV.P.

8 DATED this 30th day of June, 2006.

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11 Lawrence O. Anderson  
12 United States Magistrate Judge  
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